Nos. 17-1717 & 18-18

IN THE SUPREME COURT OF THE UNITED STATES

THE AMERICAN LEGION, et. al.,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, et. al.,

Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, et. al.,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to religious liberty, the sanctity of human life, and the natural family. Liberty Counsel is committed to upholding the historical understanding and protection of the rights to free speech and free exercise of religion, and to ensuring that those rights remain an integral part of our legal protections.

Liberty Counsel represented the Petitioners in *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), as well as other individuals, institutions, organizations and governmental entities who have struggled to negotiate the maze of this Court's Establishment Clause jurisprudence. In particular, Liberty Counsel and its clients have wrestled with the question of whether, when and

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondents have filed blanket consents to the filing of Amicus Briefs in favor of either party or no party.

how the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) should be applied to passive displays such as the Bladensburg monument. In its arguments to the Court in *McCreary County* and in subsequent briefs since then, Liberty Counsel has asked this Court to abandon *Lemon* in favor of an objective standard.

Liberty Counsel is again asking this Court to reject *Lemon* and consider an objective test derived from history, ubiquity and the absence of coercion.

SUMMARY OF ARGUMENT

This case presents the latest example of the confusion and chaos arising from the continuing sentience of the test adopted by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As members of the Court have noted for nearly 30 years, the *Lemon* test is an unworkable standard that has caused more confusion than clarity. Government officials and appellate judges have been forced to journey through a maze fraught with wrong turns, dead ends and confusing guideposts that lead to contradictory results even with virtually identical factual scenarios.

Cases decided since this Court's opinions in *McCreary County* and *Van Orden v. Perry*, 545 U.S. 677 (2005), have exacerbated the chaos arising from continuing application of the *Lemon* test to Establishment Clause challenges of government displays. In particular,

identifying the "reasonable observer" and defining his knowledge and memory in order to determine whether a display evinces an impermissible religious purpose has proven to be a Sisyphean task. Without bright-line rules to guide them, judges have had to engage in ad hoc, subjective determinations which offer no guidance to government officials trying to comply with the Establishment Clause or to other judges struggling to address similar challenges. The result is a patchwork of inconsistent and contradictory opinions between and within circuits.

The time has long passed to euthanize and fully inter the *Lemon* test and to adopt a standard that will provide clarity and consistency for citizens, government officials and the courts. An objective standard would bring the Court's Establishment Clause jurisprudence more in line with the First Amendment, this country's heritage, and this Court's historical interpretation of the clause. Liberty Counsel respectfully requests that the Court adopt such a standard.

ARGUMENT

I. THIS COURT'S FREQUENT CRITICISM OF, OCCASIONAL DEPARTURE FROM, AND OCCASIONAL RELIANCE ON, THE LEMON TEST FOR PASSIVE GOVERNMENT DISPLAYS DEMONSTRATE WHY IT MUST BE ABANDONED AS UNWORKABLE.

Nearly 30 years have passed since Justice Kennedy said that a "substantial revision of our Establishment Clause doctrine might be in order." *County of Allegheny v. ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part, dissenting in part). The ensuing decades of inconsistent results in passive government display cases have only intensified the need for revision of this Court's Establishment Clause jurisprudence, particularly in answering the question of whether, when and how the *Lemon* test should be used. Justice Scalia's comment that "more decisions on the subject have been rendered, but they leave the theme of chaos securely unimpaired" is more true today than ever. *Edwards v. Aguilard*, 482 U.S. 578, 640 (1987) (Scalia, J., dissenting). As Justice Scalia observed:

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious government official can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which of course is unconstitutional.

Id. at 636. Justice Scalia continued:

> In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it "sacrifices clarity and predictability for flexibility." *Committee for Public Education & Religious Liberty* v.

> *Regan*, 444 U.S. [646], at 662, 100 S.Ct. [840], at 851 [(1980)]. One commentator has aptly characterized this as "a euphemism ... for ... the absence of any principled rationale." [citation omitted]. I think it time that we sacrifice some "flexibility" for "clarity and predictability." Abandoning Lemon's purpose test – a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment, and, as today's decision shows, has wonderfully flexible consequences – would be a good place to start.

Id. at 639-640.

Former Chief Justice Rehnquist similarly called for abandonment of *Lemon*, and particularly its "purpose" prong, which is not "a proper interpretation of the Constitution," has "no basis in the history" of the First Amendment and "has proven mercurial in application." *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, C.J., dissenting). "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it." *Id.* at 112.

Justice Scalia similarly called the Lemon test "meaningless" in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting). "The problem with (and the allure of) *Lemon* has not been that it is 'rigid,' but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire." *Id.* In his dissent in *McCreary County*, Justice Scalia pointedly described the flaws in *Lemon*'s "reasonable observer" standard and the concomitant concept of "religious taint" resulting from prior governmental actions that the Court has sometimes applied:

> As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today's opinion is no different. In two respects it modifies *Lemon* to ratchet up the Court's hostility to religion. First, the Court justifies inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an "'objective observer.'" Because in the Court's view the true danger to be guarded against is that the objective observer would feel like an

> "'outside[r]'" or "'not [a] full membe[r] of the political community,'" its inquiry focuses not on the actual purpose of government action, but the "purpose apparent from government action." Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise.

McCreary County, 545 U.S. at 900-01 (Scalia, J., dissenting). "[T]he legitimacy of a government action with a wholly secular effect would turn on the misperception of an imaginary observer that the government officials behind the action had the intent to advance religion," *Id.* at 901.

Adherence to the *Lemon* test and its reliance upon the perceptions of a "reasonable observer" has created a *de facto* "heckler's veto" of passive government displays, such as the Bladensburg monument. Rather than analyzing whether the government intended to "establish" a religion, courts must psychoanalyze whether a fictional "reasonable observer" perceives that the government is favoring religion.

However, when Justice O'Connor introduced the "reasonable observer" standard as part of the "endorsement" prong of *Lemon*, she envisioned that it would be similar to the

"reasonable person" in tort law, who "is not to be identified with any ordinary individual, who might occasionally do unreasonable things," but is "rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring).

> Thus, "we do not ask whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think [the State] endorses religion." [citation omitted]. Saying that the endorsement inquiry should be conducted from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share neither chooses the perceptions of the majority over those of a "reasonable non-adherent," *cf.* L. Tribe, AMERICAN CONSTITUTIONAL LAW 1293 (2d ed. 1988), nor invites disregard for the values the Establishment Clause was intended to protect. It simply recognizes the fundamental difficulty inherent in focusing on

> actual people: There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. *A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.*

Id. at 780 (emphasis added). Under *that* formulation, the endorsement inquiry *should not* be "about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Id.* at 779 (emphasis added). The test should not "focus on the actual perception of individual observers, who naturally have differing degrees of knowledge." *Id.* "Under such an approach, a religious display is necessarily precluded so long as some passersby would perceive a governmental endorsement thereof."

As this Court's inconsistent precedents demonstrate, contrary to Justice O'Connor's vision, courts *have* focused on the actual perceptions of individual observers with differing degrees of knowledge. If a panel's particular version of the "reasonable observer" perceives that a government observance or display favors religion in a way that offends

them, then the observance or display is constitutionally invalid. However, if the panel's version of the "reasonable observer" would not perceive that a government observance or display favors religion in a way that offends them, then the display is valid.

The Supreme Court has roundly criticized the *Lemon* test and its "reasonable observer" and "endorsement" prongs and has refused to apply them in many cases. However, the Court has not explicitly abandoned *Lemon*. Instead, as Justice Scalia observed:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman*, 505 U.S. 577, 586–587, 112 S.Ct. 2649, 2654, 120 L.Ed.2d 467 (1992), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of

the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.....

The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984) (noting instances in which Court has not applied *Lemon* test). When we wish to strike down a practice it forbids, we invoke it, *see, e.g., Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985) (striking down state remedial education program administered in part in parochial schools); when we wish to uphold a practice it forbids, we ignore it entirely, *see Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (upholding state legislative chaplains). Sometimes, we take a middle course, calling its three

> prongs "no more than helpful signposts," *Hunt v. McNair*, 413 U.S. 734, 741, 93 S.Ct. 2868, 2873, 37 L.Ed.2d 923 (1973). Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398-400 (1993) (Scalia, J., concurring in judgment).

What this Court initially intended to be a yardstick for measuring when government crosses the line from acknowledgement to endorsement has morphed into a weapon used selectively to eliminate public religious expression when a particular panel deems it to cross an imaginary line. Such a "heckler's veto" is antithetical to the Founders' understanding of the Establishment Clause. The continuing stream of cases raising Establishment Clause challenges to passive displays such as the war memorial here points to the urgent need to abandon the *Lemon* test and adopt an objective test.

II. WHOLLY INCONSISTENT RULINGS IN PASSIVE RELIGIOUS DISPLAY CASES ILLUSTRATE HOW THE LEMON TEST HAS CONFUSED INSTEAD OF CLARIFIED THE QUESTION OF WHEN A GOVERNMENT DISPLAY VIOLATES THE ESTABLISHMENT CLAUSE.

A. Fractured Rulings In Holiday Display Cases Show How The Lemon Test Is Unworkable As An Analytical Tool.

The utter failure of the *Lemon* test is illustrated by internally inconsistent results in passive holiday display cases. Nearly identical displays featuring mixtures of religious and secular symbols yielded vastly different results based upon different justices' views on the "reasonable observer's" perceptions.

1. Lynch v. Donnelly

For example, Justice O'Connor found that a reasonable observer could not view a city's Christmas display that included a crèche, Santa Claus house, reindeer, candy-striped poles, Christmas tree and carolers as endorsing religion. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). "Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the

setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display." *Id.*

However, Justices Brennan, Marshall, Blackmun and Stevens disagreed: "For many, the City's decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing 'a significant symbolic benefit to religion...." *Id.* at 701 (Brennan, J. dissenting).

2. *County of Allegheny v. ACLU*

Holiday displays in a county courthouse resulted in equally fractured rulings under the endorsement test. *County of Allegheny v. ACLU,* 492 U.S. 573 (1989). One of the displays challenged in the case was a crèche placed in the county courthouse and the other a display that included a menorah, Christmas tree, and sign saluting liberty in front of the city-county building. *Id.* at 587. Analyzing the tree and menorah display, the plurality found that a reasonable observer would not view the addition of the menorah to the tree display as an endorsement of the Christian and Jewish faiths. *Id.* at 620.

Justice O'Connor said that the display "conveyed a message of pluralism and freedom of belief during the holiday season." *Id.* at 635

(O'Connor, J. concurring). "A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." *Id.* at 635-36.

However, Justice Brennan stated that the reasonable observer could not overlook the "religious significance" of the Christmas tree when it is placed next to a menorah. *Id.* at 641 (Brennan, J., concurring in part and dissenting in part). "I shudder to think that the only 'reasonable observer' is one who shares the particular views on perspective, spacing and accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law." *Id.* at 642-43.

Justice Stevens also found that the reasonable observer would find that the "presence of the Chanukah menorah, unquestionably a religious symbol, gives religious significance to the Christmas tree. The overall display thus manifests governmental approval of the Jewish and Christian religions." *Id.* at 654 (Stevens, J., concurring in part and dissenting in part).

Justice Kennedy's characterization of the endorsement/reasonable observer standard in

County of Allegheny illustrates why *Lemon* is ineffectual as a constitutional measuring stick. *Id.* at 675-76 (Kennedy, J. dissenting).

> This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication. "It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended – but would have been less so were the crèche five feet closer to the jumbo candy cane." *American Jewish Congress v. Chicago*, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting).

Id. Rather than providing an objective, neutral standard for courts to use when analyzing Establishment Clause challenges and legislatures to use when drafting legislation,

Lemon's endorsement test and its "reasonable observer" standard have only further complicated what was already a labyrinthine constitutional analysis. This is also seen in passive displays involving the Decalogue and, as in this case, crosses.

B. Conflicts Regarding The Constitutionality Of Historic Document Displays Featuring The Ten Commandments Illustrate How The *Lemon* Test Leads To Unprincipled Results.

The inconsistent decisions regarding displays that include the Ten Commandments demonstrate how, as Chief Justice Rehnquist predicted, the *Lemon* test and its purpose prong yield unprincipled results. *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). Historical displays that include the Decalogue have been found constitutional or unconstitutional, depending upon how the courts applied *Lemon*. Foundations of American Law and Government displays, which consist of nine documents in equally-sized frames, one of which is the Ten Commandments, have been donated by private parties and displayed in county government buildings throughout the country. Lawsuits claiming that the displays violate the Establishment Clause were filed

against counties in Kentucky, Tennessee and Indiana. Two such displays in McCreary and Pulaski counties in Kentucky were found to be unconstitutional by this Court in *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005).

Since then, lower court judges examining identical displays in other Kentucky counties reached contradictory conclusions regarding their constitutionality. *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005) (finding the Foundations Display constitutional); *ACLU v. Rowan County*, 513 F. Supp. 2d 889 (E.D.Ky. 2007) (same); *ACLU v. Grayson County*, 591 F.3d 837, 856 (6th Cir. 2010) (same). Illustrating the hopeless confusion of the *Lemon* test, an identical historical display could be unconstitutional in one Kentucky county, but constitutional in another, depending upon, *inter alia*, the subjective belief of the fictional "reasonable observer."

Furthermore, according to the Seventh Circuit, a "reasonable observer" of the same display in Elkhart County Indiana would "think history, not religion." *Books v. Elkhart Cty., Ind.*, 401 F.3d 857, 869 (7th Cir. 2005). The same display that was alternatively religious or secular in Kentucky was found to be "a secular display in its purpose and effect" in Indiana. *Id.*

These decisions exemplify the kind of unprincipled results wrought by the *Lemon* test. Under the *Lemon* test, whether a Foundations Display is constitutional does not depend on the

content and context of the display, but upon how third parties would perceive the reason for the display. Such unpredictable findings demonstrate why the *Lemon* test must be replaced with an objective standard which would find that these passive displays of historical documents are permissible, non-coercive acknowledgments of religion.

C. Whether and How Lemon Should Be Applied Has Also Left Analyses of Decalogue Monuments Hopelessly Confused.

In *Van Orden*, this Court determined that the *Lemon* test should not be applied to a granite Ten Commandments monument on the grounds of the Texas State Capitol. *Van Orden v. Perry*, 545 U.S. 677 (2005).

> Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

Id. at 686. The Court noted that the passive granite monument was different from other government acknowledgements of religion such as prayer and posting of Ten Commandments in schools. *Id.* at 691. "The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment." *Id.* at 691-92.

Since *Van Orden*, circuit courts analyzing Ten Commandments monuments have reached conflicting conclusions about whether to apply *Lemon* and if so, whether the monuments are constitutional.

A few recent examples demonstrate how the question of whether, when and how *Lemon* should apply to passive displays remains hopelessly confused.

1. Tenth Circuit: Lemon applies and the monument is unconstitutional.

According to the Tenth Circuit, "the context and apparent motivation of the Ten Commandments' placement on the lawn" outside City Hall in Bloomfield New Mexico "had the effect of endorsing religion in violation of the Establishment Clause." *Felix v. City of*

Bloomfield, 841 F.3d 848, 864 (10 Cir. 2016). The *Felix* Court used the *Lemon* test to find that "Bloomfield impermissibly gave the impression to reasonable observers that the City was endorsing religion." *Id.* at 856. The Court focused particularly on the text of the monument, its placement on the lawn and its financing and installation. *Id.* at 857.

> The language on the granite tablet—taken from the King James Version of the Bible—unquestionably has the effect of excluding the belief systems of nonadherents....Plaintiffs are a case in point. As polytheistic Wiccans, they believe in more than one deity. The first Commandment, however, admonishes the reader that "Thou shalt have no other gods before me." (See App. Fig. 1). It is hard to imagine a religious statement that is more likely to give Plaintiffs the impression they do not belong.

Id. at 857-58. Furthermore, the placement of the monument next to the sidewalk leading to City Hall meant "[a]n objective observer going to pay his water bill, or merely driving by in his car, would associate the Monument with the government, and accordingly glean a message of endorsement which the Establishment Clause

proscribes." *Id.* at 858. Finally, the fact that the monument was initially erected by itself during a ceremony that featured religious speech created a "taint" that was not mitigated by the presence of other historical monuments. *Id.* at 864.

Notably, the court acknowledged that placement of the Ten Commandments amid other historical monuments as was eventually done in Bloomfield could change what viewers perceive as the purpose of the display, as was the case of the display in *Van Orden*. *Id.* at 863. However, the city's efforts in that case did not have that effect. *Id.* Exemplifying the uncertainty of the *Lemon* test, the court said it could not articulate what measures would be necessary to remove the religious "taint" from the display, just that what Bloomfield did was not enough. *Id.*

2. Ninth Circuit: Van Orden, not Lemon, applies and the monument is constitutional.

The Ninth Circuit read *Van Orden* as narrowly eschewing *Lemon* and creating an exception for certain Ten Commandments displays, and found that exception was applicable to the granite Decalogue in the City

of Everett, Washington. *Card v. City of Everett*, 520 F.3d 1009, 1018 (2008). Again articulating the uncertainty surrounding *Lemon* and when it should be applied, the court said:

> We cannot say how narrow or broad the "exception" may ultimately be; not all Ten Commandments displays will fit within the exception articulated by Justice Breyer [in *Van Orden*]. However, we can say that the exception at least includes the display of the Ten Commandments at issue here.

Id. In that case, the presence of the monument on public property, the presence of clergy at the dedication ceremony and the sacred nature of the text did not militate against a secular purpose as the Tenth Circuit found in *Felix*. *Id.* at 1020. Also, while the Tenth Circuit found that disclaimers on the monument did not negate the impermissible religious purpose in *Felix*, in *Card*, the Ninth Circuit found that a statement indicating that the monument was donated by a third party did militate against a religious purpose. *Id.* "[T]his serves to send a message to viewers that, while the monument sits on public land, it did not sprout from the minds of City officials and was not funded from City coffers." *Id.*

3. Eighth Circuit: Lemon does not apply and the monuments are constitutional.

The Eighth Circuit has twice eschewed *Lemon* and applied *Van Orden* to find that Decalogue monuments do not violate the Establishment Clause. *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*, 419 F.3d 772 (8th Cir.2005) (en banc); *Red River Freethinkers v. City of Fargo*, 764 F.3d 948 (8th Cir. 2014).

In *Plattsmouth*, the court said:

> The Supreme Court's decision in *Van Orden* governs our resolution of this case. Like the Ten Commandments monument at issue in *Van Orden*, the Plattsmouth monument makes passive—and permissible—use of the text of the Ten Commandments to acknowledge the role of religion in our Nation's heritage.

419 F.3d at 776–77. Similarly, in *Red River Freethinkers* the court said:

> A passive display of the Ten Commandments on public land is

> evaluated by the standard *in Van Orden v. Perry*, 545 U.S. at 690–91, 125 S.Ct. 2854, which found *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), "not useful in dealing with [a] passive monument."

764 F.3d at 949. As was true in *Van Orden*, and is true of the monument in this case, the Decalogue monuments in Plattsmouth and Fargo had been in place, undisturbed, for decades, suggesting strongly that "few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion." *Red River Freethinkers*, 764 F.3d at 950, quoting *Van Orden*, 545 U.S. at 702 (Breyer, J. concurring).

The court dismissed petitioners' claims that a resolution drive prompted by the lawsuit changed the purpose of the monument because the resolution drive included Christian overtones. *Id.*

> The Freethinkers' lawsuit, and the various motives of the petitioners who responded, did not change its meaning .... A contrary holding—that an Establishment Clause

> dispute itself can render a monument impermissible under the Establishment Clause—would "encourage disputes concerning the removal of longstanding depictions of the Ten Commandments ... [and] thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."

Id. at 950-51, quoting *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

So, as Justice Scalia intimated, the *Lemon* test continues to be a docile monster brought out to strike down passive monuments in some circumstances but kept restrained in others. *Lamb's Chapel* 508 U.S. at 398-400. Such a creature might be useful for entertainment, but it is wholly ineffective as a constitutional measuring stick. As these cases illustrate, the only consistency in Establishment Clause challenges to passive displays of the Decalogue is the inconsistency of outcome. Legislators, citizens and judges deserve an objective standard to guide their decision-making processes.

D. Contradictory Analyses Of Passive Monuments Containing Crosses And A Statue Further Illustrate Why Lemon Must Be Abandoned.

The utter uselessness of *Lemon* as a constitutional yardstick for passive government monuments that include crosses is best illustrated by the fractured opinions of this Court in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995). Justice O'Connor found that the reasonable observer looking at the Ku Klux Klan's display of a Latin cross in a plaza next to the state capital "would view the Klan's cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct." *Id.* at 782 (O'Connor, J., concurring).

> Moreover, this observer would certainly be able to read and understand an adequate disclaimer, which the Klan had informed the State it would include in the display at the time it applied for the permit, and the content of which the Board could have defined as it deemed necessary as a condition of granting the Klan's application.

Id. By contrast, Justice Stevens found:

> [A] reasonable observer would likely infer endorsement from the location of the cross erected by the Klan in this case. Even if the disclaimer at the foot of the cross (which stated that the cross was placed there by a private organization) were legible, that inference would remain, because a property owner's decision to allow a third party to place a sign on her property conveys the same message of endorsement as if she had erected it herself.

Id. at 806 (Stevens, J., dissenting). Justice Ginsburg similarly said that a reasonable observer viewing the stand-alone cross and aware that "no human speaker was present to disassociate the religious symbol from the State...." would conclude that the state endorsed the display. *Id.* at 817 (Ginsburg, J., dissenting).

As Justice Scalia observed, the justices' disagreement about whether the "hypothetical beholder who will be the determinant of 'endorsement' should be any beholder (no matter how unknowledgeable), or the average beholder, or (what Justice STEVENS accuses the concurrence of favoring) the 'ultra-reasonable'

beholder" shows how the endorsement test has led to "invited chaos." *Id.* at 768 n.3.

> And, of course, even when one achieves agreement upon that question, it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultra-reasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield.

Id. The dissonant opinions in *Pinette* have been repeated in circuit court cases which have found monuments containing crosses, and in one case a statue of Jesus, both constitutional and unconstitutional using the *Lemon* test.

Although the cross monuments, such as the Bladensburg memorial here, are passive displays similar to the Decalogue monument in *Van Orden*, courts have not used the *Van Orden* exception, but have continued to use *Lemon* to analyze Establishment Clause claims. This again illustrates the need for this Court to adopt an objective test.

1. Ninth Circuit: Mt. Soledad cross unconstitutional, Christ statue constitutional.

The Ninth Circuit found that the Mt. Soledad cross, a war memorial similar to the memorial here, had a secular purpose but an impermissible effect. *Trunk v. City of San Diego*, 629 F.3d 1099, 1109 (9th Cir. 2011). While acknowledging the ubiquity of crosses as memorials for fallen soldiers, the court determined that the longstanding use of crosses as memorials could not overcome the religious exclusivity message. *Id.* at 1124-25.[2]

> The use of such a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion. It suggests that the government is so connected to a particular religion

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[2] The Eleventh Circuit made a similar ruling regarding a comparable monument in the City of Pensacola, Florida. *Kondrat'yev v. City of Pensacola, Florida*, 903 F.3d 1169 (11th Cir. 2018), *petition for cert. docketed sub nom., City of Pensacola, Florida, et al. v. Amanda Kondrat'yev, et al.*, U.S., September 18, 2018.

> that it treats that religion's symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating.

Id.

> That a cross may be permissible when it is merely one facet of a large, secular memorial in which it does not hold a place of prominence does not speak to the constitutionality of a cross that is the centerpiece of and dominates a memorial, the secular elements of which are subordinated to the cross. Faced with such a cross, a reasonable observer would perceive a sectarian message of endorsement.

Id. at 1124.

However, when faced with a 12-foot-tall statue of Jesus Christ on a mountaintop on leased federal land, a reasonable observer would not perceive a sectarian message of endorsement. *Freedom From Religion Foundation v. Weber*, 628 Fed.Appx. 952, 954 (9th Cir. 2015). While the cross on a mountaintop was impermissible, the statue of Christ on a mountaintop was permissible because, *inter alia*, "besides the statue's

likeness, there is nothing in the display or setting to suggest a religious message." *Id.*

> The mountain's role as a summer and winter tourist destination used for skiing, hiking, biking, berry-picking, and site-seeing suggests a secular context; the location does not readily lend itself to meditation or any other religious activity, and the setting suggests little or nothing of the sacred; ...the flippant interactions of locals and tourists with the statue suggest secular perceptions and uses: decorating it in mardi gras beads, adorning it in ski gear, taking pictures with it, high-fiving it as they ski by, and posing in Facebook pictures; ... local residents commonly perceived the statue as a meeting place, local landmark, and important aspect of the mountain's history as a ski area and tourist destination; and, ...there is an absence of complaints throughout its sixty-year history.

Id. (internal quotations and citations omitted) That the same circuit could find that a cross memorializing veterans on a mountaintop endorses religion and a statue of Jesus on a

mountaintop does not endorse religion points to the absurd results wrought by the *Lemon* test.

2. Second Circuit: 9/11 cross memorial constitutional.

The Second Circuit's rejection of an atheist organization's challenge to the Cross at Ground Zero illustrates how the lack of an objective test invites Establishment Clause challenges even when there are no religious undertones in a passive government display. *American Atheists v. Port Authority,* 760 F.3d 227 (2nd Cir. 2014). In *Port Authority,* even the atheist petitioners agreed that "The Cross at Ground Zero is a genuine historic artifact of recovery and healing efforts after the September 11 attacks." *Id.* at 239. However, they insisted that the Port Authority's actual purpose for displaying the cross beams from the World Trade Center "must be religious because the cross's particular historical significance derives from its religious symbolism and devotional use." *Id.* In rejecting that argument, the Second Circuit noted that there is no precedent from this Court requiring such a *per se* attribution of religious purpose. *Id.* That, coupled with the extensive record showing a secular purpose compelled the conclusion that the memorial satisfied *Lemon*'s purpose prong. *Id.*

The court further found that the "reasonable observer" "would not understand the effect of [the display] to be the divisive one of promoting religion over nonreligion." *Id.* at 244. "Nor would he think the primary effect of displaying The Cross at Ground Zero to be conveying a message to atheists that they are somehow disfavored 'outsiders,' while religious believers are favored 'insiders,' in the political community." *Id.*

The fact that remnants of a destroyed building that happened to take the shape of a cross could be challenged as an impermissible religious symbol when placed in a memorial illustrates how the failure to articulate an objective standard for analyzing passive displays leads to uncertainty and inconsistency. The lower courts' opinions in this case offer further evidence of the unprincipled results obtained by relying upon *Lemon* and provide this Court with the opportunity to finally jettison *Lemon* in favor of an objective test.

III. THIS COURT SHOULD FINALLY ABANDON THE UNWORKABLE *LEMON* TEST IN FAVOR OF AN OBJECTIVE STANDARD.

The utter confusion illustrated above demonstrates the urgency of adopting an objective test that better fits the Founders' intentions for the Establishment Clause. An

objective test would properly differentiate between permissible public acknowledgment and impermissible public endorsement of religion, which would comport with this Court's concern that the country continues to honor "the religious history that gave birth to our founding principles of liberty." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring). As Justice Scalia said, "I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied–the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments." *Van Orden* 545 U.S. at 692 (Scalia, J., concurring).

The wide variety of governmental functions that might be challenged under the Establishment Clause means that there cannot be a "one size fits all" test. "Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S.

687, 720 (1994) (O'Connor, J., concurring in part).

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. There is, after all, only one Establishment Clause, one Free Speech Clause, one Fourth Amendment, one Equal Protection Clause. *See Craig v. Boren*, 429 U.S. 190, 211, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (Stevens, J., concurring). But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry – personal liberty, an informed citizenry, government efficiency, public order, and so on – are present in different degrees in each context. And setting

> forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless.... *Lemon* has, with some justification, been criticized on this score.

Id. at 718-19. As is true with Free Speech cases, Establishment Clause challenges involve different contexts, including: 1) government action targeted at particular individuals or groups, 2) government (acknowledgment or) speech on religious topics, 3) government decisions involving religious doctrine and law and 4) governmental delegations of power to religious bodies, under which the issues underlying the clause will operate quite differently. *See id.* at 720. In other words, there are different standards and concerns with funding cases, church property or employment disputes, and government acknowledgments of religious expression. Establishment Clause concerns are more heightened in the former two than in the latter. Government funding of religious activities or judicial inquiry into church practices to resolve property or personnel matters are more likely to raise Establishment Clause concerns than are "under God" in the Pledge of Allegiance, "In God We Trust" on our currency, passive displays that include the

Decalogue, war memorials that include crosses, as is the case here, or stand-alone granite Decalogue monuments.

Lemon has proven incapable of separating a real threat from a harmless shadow, an *establishment* of religion from an *acknowledgment*. As Justice O'Connor cautioned, "the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*." *Grumet*, 512 U.S. at 720.

This case is the latest example of the truth of Justice O'Connor's conclusion. The various patches applied to *Lemon*, including the "endorsement" test, have only added to the confusion that has left this Court's Establishment Clause jurisprudence "in hopeless disarray." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

Instead of continuing to patch up *Lemon*, this Court should undertake an objective analysis for Establishment Clause challenges of government observances and displays:

> If a religious observance or display (A) comports with history and ubiquity, and (B) does not objectively coerce participation in a

religious exercise or activity, then it is a permissible acknowledgment of religion, not a violation of the Establishment Clause.

A. History And Ubiquity, Properly Applied, Would Distinguish Acknowledgment From Establishment.

This Court has found historical meaning to be relevant in upholding legislative prayers, property tax exemptions, crèches, and granite Decalogue monuments. *Van Orden*, 545 U.S. at 686. Ubiquitous practices that comport with our nation's history constitute permissible acknowledgment, not impermissible establishment, of religion. *Lynch*, 465 U.S. at 693 (O'Connor, J. concurring); *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring).

A practice is ubiquitous when it is "observed by enough persons" to warrant the term. *Elk Grove*, 542 U.S. at 37 (O'Connor, J., concurring). Ubiquity is less helpful than history. Every practice has had small beginnings, and some practices create new arrangements based on old traditions. Each Presidential invocation of God is both new and old. State mottos, constitutional preambles, the Pledge of Allegiance, and crèche displays began at a point in history. Pressing ubiquity too much

would mean crèches were once impermissible but are now permissible because more people celebrate Christmas. At an extreme, an established church could become permissible because most people have acted in a way over time to establish religion.

Ubiquity is helpful only to the extent that it illuminates historical tutelage, one of the two aspects of history, the other being historical meaning. Historical tutelage looks at historical practices to distinguish between mere shadows of religious acknowledgment versus real threats of establishment. References to God in the country's mottos, constitutions, historical documents and memorials have neither established nor tended to establish religion and would, therefore, be regarded as mere shadows of religious acknowledgment, not establishments.

Whether an acknowledgement of religion has sparked controversy is not helpful in discerning between acknowledgment and establishment. Longstanding practice and the lack of controversy do not create "a vested or protected right" to violate the Constitution. *Elk Grove*, 542 U.S. at 39. However, the presence of controversy can undercut a constitutional practice. *Id.* Litigation is, by definition, a controversy. Relying upon controversy could create a "heckler's veto," as happened in this case, which would doom not only monuments, but such acceptable practices as Sunday closing

laws, school funding, and legislative prayer, all of which the Supreme Court has upheld as constitutional. *See e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565. 587-88 (2014).

What is relevant, then, is whether history reveals that a practice has established or tended to establish religion. A historical analysis should look for the best understanding of the purposes of the Establishment Clause for which there is some agreement. Some general assumptions regarding the meaning of the Establishment Clause include that government cannot establish a church, discriminate among sects, or objectively compel a certain sectarian belief.

This Court has declared that the Establishment Clause permits government funding of religious activities or education in the form of vouchers, scholarships, transportation, books, teaching materials, projectors, onsite training by public school teachers, interpreters, remedial education, buildings, revenue bonds, and construction grants.[3] The Court has also

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[3] *See e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 667-68 (2002) (vouchers); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (interpreters); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (counseling); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (scholarship); *Mueller v. Allen*, 463 U.S. 388 (1983) (tuition tax deduction); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (textbook loans).

said that property tax exemptions, a government-funded hospital run by a Roman Catholic order, and Medicare funds used by sectarian healthcare providers pose no constitutional problem.[4] Although a guiding principle in government funding cases centers on neutrally available benefits and private choices, the fact remains that the religious mission of the institution is advanced. If the Establishment Clause is not violated in (at least indirect) government funding of sectarian institutions and education which advances the religious mission, then it cannot be violated by the mere presence of a passive display of a Latin cross amid other war memorials. If funding cases have not raised the shadow of an established religion, then passive displays will not. Surely this Court is "unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage, long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of

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[4] *See e.g., Zelman*, 536 U.S. at 667-68; *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (property tax exemption); *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (treaty and trust funds for religious education); *Braunfield v. Roberts*, 175 U.S. 291 (1899) (religious hospital).

establishment of a state church is farfetched indeed." *Lynch*, 465 U.S. at 686.

B. Objectively Non-Coercive Historical Practices Do Not Offend the Establishment Clause.

True, objective coercion has always been and remains inimical to the Founders' vision and impermissible under the Establishment Clause. *Van Orden*, 545 U.S. at 693-94 (Thomas, J. concurring). The Framers understood that an establishment necessarily involved "actual legal coercion." *Id.* at 693. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). "Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. L. Levy, THE ESTABLISHMENT CLAUSE 4 (1986)." *Id.* "Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed

for the costs of building and repairing churches. *Id.*, at 3-4." *Id.* at 641-42. "In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers." *Van Orden*, 545 at 693 (Thomas, J. concurring). "[G]overnment practices that have nothing to do with creating or maintaining ... coercive state establishments simply do not implicate the possible liberty interest of being free from coercive state establishments." *Id.* at 693-94.

Government acknowledgments of religion are pervasive. The mere presence of a religious symbol or statement that is pervasive historically and physically does not send a message of compulsion. Acknowledgments such as passive displays are far less likely to pose a real threat of coerced belief than the state churches that were a concern for the Founding Fathers. References to God and religion in our Nation are "the inevitable consequence of the religious history that gave birth to our founding principles of liberty." *Elk Grove*, 542 U.S. at 39.

The "Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part, dissenting in part). "Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it

benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." *Id.* at 662-63. The presence of a granite depiction of the Decalogue does not "coerce anyone to support or participate in any religion or its exercise" and does not "give direct benefits to a religion in such a degree that it in fact establishes a state religion or tends to do so." *Id.* at 659. "[I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 659-60. "Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Id.* at 662.

Focusing on coercion in the form of legal compulsion would comport with the Supreme Court's historical Establishment Clause jurisprudence and with the Framers' intent. This more objective standard would relieve the confusion and chaos that *Lemon* has spawned and would provide local governments with the kind of definitive guidance that is necessary to retain historically significant religious observances without fear of being sued by offended observers.

If the Establishment Clause reaches its apex in government funding of sectarian

institutions and permits funding that at least indirectly advances the religious mission, then a passive display of a cross commemorating war dead must be found to comport with the Establishment Clause. If governmental funding has not raised the shadow of an established religion, then the World War I memorial standing for nearly 100 years certainly cannot.

The existing analytical standard that permitted the Fourth Circuit to reach the "farfetched" conclusion, *see Lynch*, 465 U.S. at 686, that a nearly 100-year-old war memorial containing a cross violates the Establishment Clause must be re-examined and replaced.

CONCLUSION

This case presents another opportunity to finally overrule and permanently inter the unworkable and ineffective *Lemon* test and replace it with an objective standard based upon history and coercion. Amicus respectfully urges this Court to do so.

Dated: December 21, 2018.

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